Re Mohd Tajuddin Mohd Jali; ex p Perwira Habib Bank (M) Bhd

HIGH COURT (SHAH ALAM) — BANKRUPTCY NO 29–3099 OF 1993
LOW HOP BING J
3 NOVEMBER 1998

Bankruptcy *— Notice — Validity of — Interest on judgment debt in bankruptcy notice exceeded six years — Judgment debtor filed notice to oppose creditor's petition — Whether excess interest is prohibited by s 6(3) of Limitation Act 1953 so as to invalidate bankruptcy notice — Whether proviso (ii) to s 3(3) of Bankruptcy Act 1967 operates to prevent invalidation of bankruptcy notice*

The respondent obtained a judgment against the appellant on 5 June 1989 for the sum of RM2,556,610.35 and filed a bankruptcy notice against the appellant on 6 December 1993 and interest at the rate of 14.25% pa was calculated on the judgment sum from 1 January 1986 till 6 December 1993 amounting to RM5,307,012.58. At the hearing of the creditor's petition, the appellant filed a notice to oppose the creditor's petition but it was dismissed by the deputy registrar, and adjudicating and receiving orders were made against the appellant. The appellant appealed contending that the bankruptcy notice contained an element of interest that could not be recovered as s 6(3) of the Limitation Act 1953 prohibited the recovery of interest after six years from the date in which the interest became due. The respondent contended that s 6(3) applied only to 'actions upon a judgment', where one sued on a judgment which could not be enforced in any other way as in the case of a foreign judgment, and had nothing to do with matters pertaining to 'the execution of a judgment'. It was also contended that s 6(3) did not prohibit the payment of arrears of interest due on a judgment beyond six years after the interest became due as long as the act of recovery was made before the expiry of the six year period. The respondent also contended that even if excess interest was claimed, the bankruptcy notice was not invalidated due to proviso (ii) to s 3(2) of the Bankruptcy Act 1967.

The issues that the court had to consider was whether s 6(3) of the Limitation Act 1953 prohibited the charging of interest on a judgment debt after the expiration of six years from the date the interest became due and whether the judgment debtor was prevented from raising that issue in view of proviso (ii) to s 3(2) of the Bankruptcy Act 1967.

Held, allowing the appeal with costs and setting aside the order of the deputy registrar:

(1) Time for the purposes of the limitation period in respect of the arrears of interest in the second limb of s 6(3) commenced from 1 January 1986 and would have expired on 31 December 1991 even though the judgment was obtained against the judgment creditor on 5 June 1989. As the bankruptcy notice included a claim on the arrears of interest from 1 January 1986 to 6 December 1993, which was in excess of the six year period from

A 1 January 1986 to 31 December 1991, it was therefore bad in law (see p 463E–F) *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 and *Re Ernest Cheong; ex p UMBC* High Court, Kuala Lumpur (Commercial Division) D5–29–220–1996 followed.

B (2) Alternatively, the method used for deciding when interest became due was by calculating six years backwards, commencing from the date of the bankruptcy notice. As the bankruptcy notice was dated 6 December 1993, by calculating six years backwards, the operative date would be 6 December 1987. No arrears of interest would be recoverable before the operative date of 6 December C 1987 (see p 463G–H); *Re Ngan Ching Wen; ex p Moscow Narodny Bank Ltd* [1996] 2 CLJ 943 followed.

(3) The respondent could not rely on proviso (ii) to s 3(2) of the Bankruptcy Act 1967 as the appellant had filed the notice of intention to oppose the creditor's petition pursuant to r 117 of the Bankruptcy Rules 1969. As such, the appellant had a right to be D heard. Further, if such a debt was not enforceable at the time when the bankruptcy notice was issued, then an act of bankruptcy may not have been committed by the appellant. All available evidence should be placed before the court in order for it to come to a just conclusion regarding the proof of the petitioning debt or the act of bankruptcy (see p 464E–H).

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[Bahasa Malaysia summary

Responden telah mendapat satu penghakiman terhadap perayu pada 5 Jun 1989 bagi jumlah wang sebanyak RM2,556,610.35 dan telah memfailkan satu notis kebangkrapan terhadap perayu pada F 6 Disember 1993 dan faedah pada kadar 14.25% setahun telah dikira atas jumlah wang penghakiman tersebut daripada 1 Januari 1986 sehingga 6 Disember 1993, yang berjumlah sebanyak RM5,307,012.58. Di perbicaraan petisyen pemiutang, perayu telah memfailkan satu notis untuk membangkang petisyen pemiutang tersebut tetapi ia telah ditolak oleh timbalan pendaftar, dan perintah G adjudikasi dan penerimaan telah dibuat terhadap perayu. Perayu telah membuat rayuan menghujahkan bahawa notis kebangkrapan tersebut mengandungi satu elemen faedah yang tidak boleh didapat semula kerana s 6(3) Akta Had Masa 1953 melarang pendapatan semula faedah selepas enam tahun daripada tarikh di mana faedah tersebut H perlu dibayar balik. Responden menghujahkan bahawa s 6(3) hanya terpakai ke atas 'tindakan-tindakan ke atas satu penghakiman', di mana seorang yang disaman atas satu penghakiman yang tidak boleh dikuatkuasakan dalam apa cara sekalipun seperti mana di dalam kes satu penghakiman luar negara, dan tidak mempunyai apa-apa kaitan dengan perkara berhubung dengan'pelaksanaan penghakiman'. I Adalah juga dihujahkan bahawa s 6(3) tidak melarang pembayaran hutang faedah yang perlu dibayar atas satu penghakiman yang melebihi enam tahun setelah faedah tersebut perlu dibayar asalkan tindakan mendapat kembali tersebut telah dibuat sebelum tamat

tempoh enam tahun tersebut. Responden juga menghujahkan bahawa walaupun faedah yang berlebihan dituntut, notis kebangkrapan tersebut tidak menjadi tidak sah oleh sebab proviso (ii) kepada s 3(2) Akta Kebangkrapan 1967.

Isu-isu yang perlu dipertimbangkan oleh mahkamah adalah sama ada s 6(3) Akta Had Masa 1953 melarang mengenakan faedah ke atas satu hutang penghakiman setelah tamat tempoh enam tahun daripada tarikh faedah tersebut perlu dibayar dan sama ada penghakiman penghutang telah disekat daripada menimbulkan persoalan dengan mengambil kira proviso (ii) kepada s 3(2) Akta Kebangkrapan.

Diputuskan, membenarkan rayuan tersebut dengan kos dan mengetepikan perintah timbalan pendaftar:

(1) Masa bagi tujuan tempoh had masa berhubung dengan hutang faedah tersebut di dalam cabang kedua s 6(3) bermula daripada 1 Januari 1986 dan sepatutnya tamat tempoh pada 31 Disember 1991 walaupun penghakiman tersebut diperolehi terhadap pemiutang penghakiman pada 5 Jun 1989. Memandangkan notis kebangkrapan tersebut mengandungi satu tuntutan hutang faedah daripada 1 Januari 1986 sehingga 6 Disember 1993, yang melebihi tempoh enam tahun daripada 1 Januari 1986 sehingga 31 Disember 1991, oleh demikian ia adalah tidak betul di sisi undang-undang (lihat ms 463E–F).

(2) Secara alternatif, kaedah yang digunakan untuk memutuskan bila faedah sepatutnya perlu dibayar adalah dengan mengira enam tahun ke belakang, bermula daripada tarikh notis kebangkrapan tersebut. Memandangkan notis kebangkrapan tersebut bertarikh 6 Disember 1993, dengan mengira enam tahun ke belakang, tarikh yang berkuat kuasa adalah sepatutnya 6 Disember 1987 (lihat ms 463G–H); *Ngan Ching Wen, Re; ex p Moscow Narodny Bank Ltd* [1996] 2 CLJ 943 diikut.

(3) Responden tidak boleh bergantung kepada proviso (ii) kepada s 3(2) Akta Kebangkrapan 1967 kerana perayu telah memfailkan notis bertujuan untuk membangkang petisyen pemiutang menurut k 117 Kaedah Kebangkrapan 1969. Oleh demikian, perayu mempunyai hak untuk didengar. Tambahan pula, sekiranya hutang sedemikian tidak boleh dikuatkuasakan pada masa apabila notis kebangkrapan tersebut dikeluarkan, maka satu tindakan kebangkrapan mungkin tidak dilakukan oleh perayu. Segala keterangan yang ada hendaklah dihadapkan ke mahkamah supaya mahkamah boleh mencapai satu kesimpulan yang adil berhubung dengan bukti hutang yang dipetisyenkan atau tindakan kebangkrapan tersebut (lihat ms 464E–H).]

Notes

For cases on validity of bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1791–1813.

Cases referred to

Ernest Cheong, Re; ex p UMBC High Court, Kuala Lumpur (Commercial Division) D5–29–220–1996 (folld)

Malaysian Soil Investigation Sdn Bhd v EMKO Holdings Sdn Bhd [1994] 1 CLJ 267 (refd)

Ngan Ching Wen, Re; ex p Moscow Narodny Bank Ltd [1996] 2 CLJ 943 (folld)

Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 3(2), 131
Bankruptcy Rules 1969 r 117
Limitation Act 1953 s 6(3)
Reciprocal Enforcement of Judgments Act 1958

Rajinder Singh (*Tahiyub Khan* with him) (*Tahiyub Khan Othuman & Co*) for the appellant.

Michelle Wong (*Raja Darryl & Loh*) for the respondent.

AV Nadeson (Official Assignee) Official Assignee's Office.

Cur Adv Vult

Low Hop Bing J:

Appeal

This is an appeal against the decision of the learned deputy registrar who had on 25 November 1997 dismissed the judgment debtor's notice of intention to oppose the petition and made an adjudication and receiving order against the judgment debtor.

Issues for decision

The issues for decision are as follows:

(1) Whether s 6(3) of the Limitation Act 1953 prohibits the charging of interest on a judgment debt after the expiration of six years from the date the interest became due?

(2) Whether the judgment debtor is prevented from raising this issue in view of proviso (ii) to s 3(2) of the Bankruptcy Act 1967?

Submission for the judgment debtor

According to the bankruptcy notice in encl (3), the judgment creditor has claimed against the judgment debtor, interest with effect from 1 January 1986 at the rate of 14.25% pa, calculated on a daily basis, until 6 December 1993, the day on which the bankruptcy notice was issued. The amount of interest claimed against the judgment debtor is RM5,307,012.18 bearing in mind that the judgment sum is only RM2,556,610.35. The bankruptcy notice contains an element of interest which is 23 months in violation of s 6(3) Limitation Act 1953, in that, according to the Limitation Act, such

interest cannot be recovered after six years from the date in which the interest became due.

It is further submitted that, according to the judgment against the judgment debtor stated in the bankruptcy notice, interest became due against the judgment debtor from 1 January 1986, and hence on 1 January 1992, the limitation period would have set in, thereby forbidding the judgment creditor from recovering the interest for the period of 1 January 1992 till 6 December 1993 against the judgment debtor. The amount of excessive interest being recovered against the judgment debtor is approximately in the region of RM750,000 calculated on an average basis.

Submission for the judgment creditor

It is submitted for the judgment creditor that s 6(3) of the Limitation Act 1953 applies only to 'actions upon a judgment' and has nothing to do with matters pertaining to 'the execution of a judgment', and that the former usually refers to a situation where one sues on a judgment which cannot be enforced in any other way, eg a foreign judgment from Taiwan. That being the case, s 6(3) does not apply to the enforcement of interest pursuant a local judgment, as is the fact in the instant case. There is no limitation on the interest which can be charged under the judgment. Further, s 6(3) does not prohibit the payment of arrears of interest due on a judgment beyond six years after the interest becomes due, as long as the act of recovery is made before the expiry of the six year period.

Decision of the court

Statement of account in bankruptcy notice

For the purpose of completeness, it is necessary to reproduce the statement of account in the judgment creditor's bankruptcy notice in encl (3) as follows:

Judgment sum	RM2,556,610.35
Interest on the said sum of RM2,556,610.35 at the rate of 14.25% per annum calculated on daily outstanding balance at monthly rests from 1 January 1986 to 6 December 1993	RM5,307,012.58
Less Payments made	RM 10,500.00
Costs adjudged	RM 350.00
Total amount owing as at 6 December 1993	RM7,853,472.93

Judicial interpretation of s 6(3)

Section 6(3) of the Limitation Act 1953 reads as follows:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and *no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from which the interest became due.* (Emphasis added.)

A It is the second limb of s 6(3) of the Limitation Act 1953 which requires judicial interpretation in the instant case. In *Malaysian Soil Investigation Sdn Bhd v EMKO Holdings Sdn Bhd* [1994] 1 CLJ 267, Abdul Malek Ahmad J (now FCJ) held that while s 6(3) does not prohibit the payment of arrears of interest due on judgment debt beyond six years after they become due, the act of recovery must be made before the expiry of the prescribed six B years.

In *Re Ngan Ching Wen; ex p Moscow Narodny Bank Ltd* [1996] 2 CLJ 943, James Foong J held, inter alia, that no interest could be recovered in violation of s 6(3) and that the court could use the method for the purpose of deciding when interest becomes due by taking the date of C bankruptcy notice and calculating six years backwards.

In *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508, Edgar Joseph Jr J held that there was an element of interest recovery which was barred by s 6(3) of the Limitation Act 1953, namely a trifling sum of interest in respect of a period of two months, but the learned judge in that case went on to dismiss the judgment debtor's application as D his Lordship considered the defect which could be condoned under s 131 of the Bankruptcy Act 1967. In *Re Ernest Cheong; ex p UMBC* High Court, Kuala Lumpur (Commercial Division) D5–29–220–1996, Kamalanathan Ratnam JC (now J) agreed with the decision Edgar Joseph Jr J in *Wee Chow Yong*, that the six year period in the second limb of s 6(3) starts form the day the interest was due and not from the date of judgment. E

In the present case before me, the default rate of interest has been claimed since 1 January 1986, even though judgment was obtained against the judgment creditor only on 5 June 1989. Following the decision of Edgar Joseph Jr J (now FCJ) in *Wee Chow Yong* and of Kamalanathan Ratnam JC in *Re Ernest Chong* time for the purposes of the limitation period in respect F of the arrears of interest in the second limb of s 6(3) would have commenced from 1 January 1986 and would have expired on 31 December 1991. The bankruptcy notice before me, has included a claim on the arrears of interest from 1 January 1986 to 6 December 1993, which is in excess of the six year period from 1 January 1986 to 31 December 1991 and is therefore in my view bad in law.

G Alternatively, by following the decision of James Foong J in *Ngan Ching Wen*, that the method used for the purpose of deciding when interest becomes due is by calculating six years backwards, commencing from the date of the bankruptcy notice is dated. In the case before me, the bankruptcy notice was dated 6 December 1993. Hence, by calculating six H years backwards commencing 6 December 1993, the operative date would be 6 December 1987. In the circumstances, no arrears of interest would be recoverable before the operative date of 6 December 1987. It is true that judgment debtor has paid an amount of RM10,500 to account, but such payment did not wipe out the arrears of interest ie RM5,307,012.58 claimed by the judgment creditor for the period from 1 January 1986 to I 6 December 1993, which went beyond the six year limitation period prescribed in the second limb of s 6(3).

The respondent's ('the judgment creditor's') learned counsel has placed emphasis on the words 'an action upon any judgment' and illustrated

by referring to eg a judgment from a Taiwan Court. This submission, with the utmost respect, is purely academic and far detached from the facts of this case. Further, it falls outside the ambit of the Reciprocal Enforcement of Judgments Act 1958. Learned counsel for the respondent has suggested that s 6(3) has been so interpreted as not to prohibit the payment of interest due on a judgment beyond six years after they became due as long as the act of recovery is made before the expiry of the six year period. Although this submission appears to be in line with the High Court decision in *Malaysian Soil Investigation Sdn Bhd v EMKO Holdings Sdn Bhd* in the case before me, the act of recovery was taken long after the expiry of six years and the rate of interest was the default rate of 14.25%, with effect from 1 January 1986, whereas the judgment was obtained on 5 June 1989. Since judgment creditor herein decides to sue or claim the default rate of interest, then the judgment creditor must bear the consequences thereof. (See Kamalanathan Ratnam JC in *Re Ernest Chong*).

Proviso (ii) to s 3(2)

It has been further argued for the judgment creditor that pursuant to proviso (ii) to s 3(2) of the Bankruptcy Act 1967, the bankruptcy notice is not invalidated.

Proviso (ii) of s 3(2) ('the proviso') reads as follows:

> Provided that a bankruptcy notice ...
>
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; ... .

In the instant case, the judgment debtor has filed the notice of intention to oppose the creditor's petition pursuant to r 117 of the Bankruptcy Rules 1969. In the circumstances, in my view the judgment debtor has a right to be heard: *Re Ngan Ching Wen; ex p Moscow Narodny Bank Leo*. Further, if such a debt is not enforceable at the time when the bankruptcy notice was issued, then an act of bankruptcy may not have been committed by the judgment debtor. Indeed the fundamental question is whether an act of bankruptcy has been committed by the judgment debtor.

Section 6(3) Bankruptcy Act 1967 provides, inter alia, that 'if the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy, the court may dismiss the petition.'.

The court has a duty to ascertain the petitioning debt or the act of bankruptcy and it is for that reason the court must have before it all available evidence before the court can come to a just conclusion of the case.

Conclusion

On the foregoing reasons, I hold that the bankruptcy notice is invalid. I therefore allow this appeal and set aside with costs the order made by the learned registrar on 25 November 1997.

Appeal allowed with costs.

Reported by Chin En Tek